87-165

No.

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

ROGER PHILIP BRANNON,
Appellant
v.
CONNIE RANDMAA,
Appellee.

ON APPEAL FROM THE
COURT OF APPEALS
FOR THE
THIRD JUDICIAL DISTRICT
OF TEXAS

JURISDICTIONAL STATEMENT AND APPENDIX

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QUESTIONS PRESENTED

1. Do the provisions of Sections 5.01 and 5.02 of the Texas Family Code (1975) and the provisions of the Uniformed Services Former Spouse's Protection Act, 10 U.S.C. § 1408 (1983), as applied by the courts of Texas, violate the constitutional doctrine of separation of powers?

2. Does the Uniformed Services Former Spouse's Protection Act, 10 U.S.C. § 1408 (1983), allow an unconstitutional retroactive application that destroys existing and vested rights?

3. What is the extent of the retroactive reach of the Uniformed Services Former Spouse's Protection Act, 10 U.S.C. § 1408 (1983)?

LIST OF PARTIES

The caption of the case in this Court contains the names of the parties.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Third Judicial District of Texas [Appendix Page 1 hereto] is reported at 736 S.W.2d 175. The denial of review by the Supreme Court of Texas was without opinion.

STATEMENT OF JURISDICTION

This Court's appellate jurisdiction is invoked under the provisions of 28 U.S.C. § 1257(2) (1988). The validity of Sections 5.01 and 5.02 of the Texas Family Code are drawn into question by this appeal as being repugnant to the constitution and laws of the United States. The decisions of the Courts below were in favor of the validity of those sections of the Texas Family Code.

Specifically, Sections 5.01 and 5.02 of the Texas Family Code are being construed along with the Uniformed Services Former Spouse's Protection Act (USFSPA), 10 U.S.C § 1408 (1983), so as to allow the characterization of petitioner's military retirement benefits, accrued prior to the date of the decision of this Court in *McCarty v. McCarty*, 453 U.S. 210, 101 S.Ct. 2728, 69 L. Ed. 2d 589 (1981), as community property subject to division on divorce.

The Court's exercise of appellate jurisdiction is supported by *McCarty v. McCarty, supra; Koshkonong v. Burton*, 104 U.S. (14 Otto) 668, 26 L. Ed. 886 (1881); *State of Pennsylvania v. Wheeling & Bellmont Bridge Co.*, 59 U.S. (18 How.) 421, 15 L. Ed. 435 (1855); and *Ogden v. Blackledge*, 6 U.S. (2 Cranch) 272, 2 L. Ed. 276 (1802).

The judgment sought to be reviewed was entered by the Court of Appeals for the Third Judicial District of Texas on August 12, 1987, [Appendix Page 10], and was accompanied

by written opinion [Appendix Page 1]. Motion for rehearing in that Court was overruled on September 30, 1987. [Appendix Page 11].

Application for review by the Supreme Court of Texas was subsequently made and, thereafter, refused by that Court with the notation, no reversible error, on January 6, 1988. [Appendix Page 12]. This denial of review by the Supreme Court of Texas is the final judgment or decree rendered by the highest court of a state in which a decision could be had.

Notice of appeal was filed in both the Supreme Court of Texas and the Court of Appeals for the Third Judicial District of Texas on February 25, 1988. [Appendix Page 13]. Under prescribed Texas practice, the record in this case has been returned to, and is presently in the custody of, the Court of Appeals for the Third Judicial District of Texas, P.O. Box 12547, Capitol Station, Austin, Texas 78711.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS APPEAL

10 U.S.C. § 1408 (1983)

(a) In this section:

(1) "Court" means—

(A) any court of competent jursidiction of any State, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Northern Mariana Islands, and the Trust Territory of the Pacific Islands;

(B) any court of the United States (as defined in section 451 of title 28) having competent jurisdiction; and

(C) any court of competent jurisdiction of a foreign country with which the United States has an agreement requiring the United States to honor any court order of such country.

(2) "Court order" means a final decree of divorce, dissolution, annulment, or legal separation issued by a court, or a court ordered, ratified, or approved property settlement incident to such a decree (including a final decree modifying the terms of a previously issued decree of divorce, dissolution, annulment, or legal separation, or a court ordered, ratified, or approved property settlement incident to such previously issued decree), which—

(A) is issued in accordance with the laws of the jurisdiction of that court;

(B) provides for—

(i) payment of child support (as defined in section 462(b) of the Social Security Act (42 U.S.C. 662(b)));

(ii) payment of alimony (as defined in section 462(c) of the Social Security Act (42 U.S.C. 662(c))); or

(iii) division of property (including a division of community property); and

(C) specifically provides for the payment of an amount, expressed in dollars or as a percentage

of disposable retired or retainer pay, from the disposable retired or retainer pay of a member to the spouse or former spouse of that member.

(3) "Final decree" means a decree from which no appeal may be taken or from which no appeal has been taken within the time allowed for taking such appeals under the laws applicable to such appeals, or a decree from which timely appeal has been taken and such appeal has been finally decided under the laws applicable to such appeals.

(4) "Disposable retired or retainer pay" means the total monthly retired or retainer pay to which a member is entitled (other than the retired pay of a member retired for disability under chapter 61 of this title) less amounts which—

(A) are owed by that member to the United States;

(B) are required by law to be and are deducted from the retired or retainer pay of such member, including fines and forfeitures ordered by courts-martial, Federal employment taxes, and amounts waived in order to receive compensation under title 5 or title 38;

(C) are properly withheld for Federal, State, or local income tax purposes, if the withholding of such amounts is authorized or required by law and to the extent such amounts withheld are not greater than would be authorized if such member claimed all dependents to which he was entitled;

(D) are withheld under section 3402(i) of the

Internal Revenue Code of 1954 (26 U.S.C. 3402(i)) if such member presents evidence of a tax obligation which supports such withholding;

(E) are deducted as Government life insurance premiums (not including amounts deducted for supplemental coverage); or

(F) are deducted because of an election under chapter 73 of this title to provide an annuity to a spouse or former spouse to whom payment of a portion of such member's retired or retainer pay is being made pursuant to a court order under this section.

(5) "Member" includes a former member.

(6) "Spouse or former spouse" means the husband or wife, or former husband or wife, respectively, of a member who, on or before the date of a court order, was married to that member.

(b) For the purposes of this section—

(1) service of a court order is effective if—

(A) an appropriate agent of the Secretary concerned designated for receipt of service of court orders under regulations prescribed pursuant to subsection (h) or, if no agent has been so designated, the Secretary concerned, is personally served by certified or registered mail, return receipt requested;

(B) the court order is regular on its face;

(C) the court order or other documents served with the court order identify the member

concerned and include the social security number of such member; and

(D) the court order or other documents served with the court order certify that the rights of the member under the Soldiers' and Sailors' Civil Relief Act of 1940 (50 U.S.C.App. 501 et seq.) were observed; and

(2) a court order is regular on its face if the order—

(A) is issued by a court of competent jurisdiction;

(B) is legal in form; and

(C) includes nothing on its face that provides reasonable notice that it is issued without authority of law.

(c) (1) Subject to the limitations of this section, a court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court.

(2) Notwithstanding any other provision of law, this section does not create any right, title, or interest which can be sold, assigned, transferred, or otherwise disposed of (including by inheritance) by a spouse or former spouse.

(3) This section does not authorize any court to order a member to apply for retirement or retire at a particular time in order to effectuate any payment under this section.

(4) A court may not treat the disposable retired or retainer pay of a member in the manner described in paragraph (1) unless the court has jurisdiction over the member by reason of (A) his residence, other than because of military assignment, in the territorial jurisdiction of the court, (B) his domicile in the territorial jurisdiction of the court, and (C) his consent to the jursidiction of the court.

(d) (1) After effective service on the Secretary concerned of a court order with respect to the payment of a portion of the retired or retainer pay of a member to the spouse or a former spouse of the member, the Secretary shall, subject to the limitations of this section, make payments to the spouse or former spouse in the amount of the disposable retired or retainer pay of the member specifically provided for in the court order. In the case of a member entitled to receive retired or retainer pay on the date of the effective service of the court order, such payments shall begin not later than 90 days after the date of effective service. In the case of member not entitled to receive retired or retainer pay on the date of the effective service of the court order, such payments shall begin not later than 90 days after the date on which the member first becomes entitled to receive retired or retainer pay.

(2) If the spouse or former spouse to whom payments are to be made under this section was not married to the member for a period of 10 years or more during which the member performed at least 10 years of service creditable in determining the member's eligibility for retired or retainer pay, payments may not

be made under this section to the extent that they include an amount resulting from the treatment by the court under subsection (c) of disposable retired or retainer pay of the member as property of the member or property of the member and his spouse.

(3) Payments under this section shall not be made more frequently than once each month, and the Secretary concerned shall not be required to vary normal pay and disbursement cycles for retired or retainer pay in order to comply with a court order.

(4) Payments from the disposable retired or retainer pay of a member pursuant to this section shall terminate in accordance with the terms of the applicable court order, but not later than the date of the death of the member or the date of the death of the spouse or former spouse to whom payments are being made, whichever occurs first.

(5) If a court order described in paragraph (1) provides for a division of property (including a division of community property) in addition to an amount of disposable retired or retainer pay, the Secretary concerned shall, subject to the limitations of this section, pay to the spouse or former spouse of the member, from the disposable retired or retainer pay of the member, any part of the amount payable to the spouse or former spouse under the division of property upon effective service of a final court order of garnishment of such amount from such retired or retainer pay.

(e) (1) The total amount of the disposable retired or retainer pay of a member payable under subsection (d)

may not exceed 50 percent of such disposable retired or retainer pay.

(2) In the event of effective service of more than one court order which provide for payment to a spouse and one or more former spouses or to more than one former spouse from the disposable retired or retainer pay of a member, such pay shall be used to satisfy (subject to the limitations of paragraph (1)) such court orders on a first-come, first-served basis. Such court orders shall be satisfied (subject to the limitations of paragraph (1)) out of that amount of disposable retired or retainer pay which remains after the satisfaction of all court orders which have been previously served.

(3) (A) In the event of effective service of conflicting court orders under this section which assert to direct that different amounts be paid during a month to the same spouse or former spouse from the disposable retired or retainer pay of the same member, the Secretary concerned shall—

(i) pay to that spouse the least amount of disposable retired or retainer pay directed to be paid during that month by any such conflicting court order, but not more than the amount of disposable retired or retainer pay which remains available for payment of such court orders based on when such court orders were effectively served and the limitations of paragraph (1) and subparagraph (B) of paragraph (4);

(ii) retain an amount of disposable retired or retainer pay that is equal to the lesser of—

(I) the difference between the largest amount of retired or retainer pay required by any conflicting court order to be paid to the spouse or former spouse and the amount payable to the spouse or former spouse under clause (i); and

(II) the amount of disposable retired or retainer pay which remains available for payment of any conflicting court order based on when such court order was effectively served and the limitations of paragraph (1) and subparagraph (B) of paragraph (4); and

(iii) pay to that member the amount which is equal to the amount of that member's disposable retired or retainer pay (less any amount paid during such month pursuant to legal process served under section 459 of the Social Security Act (42 U.S.C. 659) and any amount paid during such month pursuant to court orders effectively served under this section, other than such conflicting court orders) minus—

(I) the amount of disposable retired or retainer pay paid under clause (i); and

(II) the amount of disposable retired or retainer pay retained under clause (ii).

(B) The Secretary concerned shall hold the amount retained under clause (ii) of subparagraph (a) until such time as that Secretary is provided with a court order which has been certified by the member and the spouse or former spouse to be valid and applicable to the retained amount. Upon being provided with such an order, the Secretary shall pay the retained amount in accordance with the order.

(4) (A) In the event of effective service of a court order under this section and the service of legal process pursuant to section 459 of the Social Security Act (42 U.S.C. 659), both of which provide for payments during a month from the retired or retainer pay of the same member, such court orders and legal process shall be satisfied on a first-come, first-serve basis. Such court orders and legal process shall be satisfied out of moneys which are subject to such orders and legal process and which remain available in accordance with the limiations of paragraph (1) and subparagraph (B) of this paragraph during such month after the satisfaction of all court orders or legal process which have been previously served.

(B) Notwithstanding any other provision of law, the total amount of the disposable retired or retainer pay of a member payable by the Secretary concerned under all court orders pursuant to this section and all legal processes pursuant to section 459 of the Social Security Act (42 U.S.C. 659) with respect to a member may not exceed 65 percent of the disposable retired or retainer pay payable to such member.

(5) A court order which itself or because of previously served court orders provides for the payment of an amount of disposable retired or retainer pay which exceeds the amount of such pay available for payment because of the limit set forth in paragraph (1), or which, because of previously served court orders or legal process previously served under section 459 of the Social Security Act (42 U.S.C. 659), provides for payment of an amount of dispos-

able retired or retainer pay that exceeds the maximum amount permitted under paragraph (1) or subparagraph (B) of paragraph (4), shall not be considered to be irregular on its face solely for that reason. However, such order shall be considered to be fully satisfied for purposes of this section by the payment to the spouse or former spouse of the maximum amount of disposable retired or retainer pay permitted under paragraph (1) and subparagraph (B) of paragraph (4).

(6) Nothing in this section shall be construed to relieve a member of liability for the payment of alimony, child support, or other payments required by a court order on the grounds that payments made out of disposable retired or retainer pay under this section have been made in the maximum amount permitted under paragraph (1) or subparagraph (B) of paragraph (4). Any such unsatisfied obligation of a member may be enforced by any means available under law other than the means provided under this section in any case in which the maximum amount permitted under paragraph (1) has been paid and under section 459 of the Social Security Act (42 U.S.C. 659) in any case in which the maximum amount permitted under subparagraph (B) of paragraph (4) has been paid.

(f) (1) The United States and any officer or employee of the United States shall not be liable with respect to any payment made from retired or retainer pay to any member, spouse, or former spouse pursuant to a court order that is regular on its face if such payment is made in accordance with this section and regulations prescribed pursuant to subsection (h).

(2) An officer or employee of the United States who, under regulations prescribed pursuant to subsection (h), has the duty to respond to interrogatories shall not be subject under any law to any disciplinary action or civil or criminal liability or penalty for, or because of, any disclosure of information made by him in carrying out any of his duties which directly or indirectly pertain to answering such interrogatories.

(g) A person receiving effective service of a court order under this section shall, as soon as possible, but not later than 30 days after the date on which effective service is made, send a written notice of such court order (together with a copy of such order) to the member affected by the court order at his last known address.

(h) The Secretaries concerned shall prescribe uniform regulations for the administration of this section.

28 U.S.C. § 1257 (1988)

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929.

42 U.S.C. § 662 (1983)

For purposes of section 659 of this title—

(a) The term "United States" means the Federal Government of the United States, consisting of the legislative branch, the judicial branch, and the executive branch thereof, and each and every department, agency, or instrumentality of any such branch, including the United States Postal Service, the Postal Rate Commission, any wholly owned Federal corporation created by an Act of Congress, any office, commission, bureau, or other administrative subdivision or creature thereof, and the governments of the territories and possessions of the United States.

(b) The term "child support", when used in reference to the legal obligations of an individual to provide such support, means periodic payments of funds for the support and maintenance of a child or children with respect to which such individual has such an obligation, and (subject to and in accordance with State law) includes but is not limited to, payments to

provide for health care, education, recreation, clothing, or to meet other specific needs of such a child or children; such term also includes attorney's fees, interest, and court costs, when and to the extent that the same are expressly made recoverable as such pursuant to a decree, order, or judgment issued in accordance with applicable State law by a court of competent jurisdiction.

(c) The term "alimony", when used in reference to the legal obligations of an individual to provide the same, means periodic payments of funds for the support and maintenance of the spouse (or former spouse) of such individual, and (subject to and in accordance with State law) includes but is not limited to, separate maintenance, alimony pendente lite, maintenance, and spousal support; such term also includes attorney's fees, interest, and court costs when and to the extent that the same are expressly made recoverable as such pursuant to a decree, order, or judgment issued in accordance with applicable State law by a court of competent jurisdiction. Such term does not include any payment or transfer of property or its value by an individual to his spouse or former spouse in compliance with any community property settlement, equitable distribution of property, or other division of property between spouses or former spouses.

(d) The term "private person" means a person who does not have sovereign or other special immunity or privilege which causes such person not to be subject to legal process.

(e) The term "legal process" means any writ, order,

summons, or other similar process in the nature of garnishment, which—

(1) is issued by (A) a court of competent jurisdiction within any State, territory, or possession of the United States, (B) a court of competent jurisdiction in any foreign country with which the United States has entered into an agreement which requires the United States to honor such process, or (C) an authorized official pursuant to an order of such a court of competent jurisdiction or pursuant to State or local law, and

(2) is directed to, and the purpose of which is to compel, a governmental entity, which holds moneys which are otherwise payable to an individual, to make a payment from such moneys to another party in order to satisfy a legal obligation of such individual to provide child support or make alimony payments.

(f) Entitlement of an individual to any money shall be deemed to be "based upon remuneration for employment", if such money consists of—

(1) compensation paid or payable for personal services of such individual, whether such compensation is denominated as wages, salary, commission, bonus, pay, or otherwise, and includes but is not limited to, severanace pay, sick pay, and incentive pay, but does not include awards for making suggestions, or

(2) periodic benefits (including a periodic benefit as defined in section 428(h)(3) of this title) or other payments to such individual under the insurance

system established by subchapter II of this chapter or any other system or fund established by the United States (as defined in subsection (a) of this section) which provides for the payment of pensions, retirement or retired pay, annuities, dependents or survivors' benefits, or similar amounts payable on account of personal services performed by himself or any other individual (not including any payment as compensation for death under any Federal program, any payment under any Federal program established to provide "black lung" benefits, any payment by the Veterans' Administration as pension, or any payments by the Veterans' Administration as compensation for a service-connected disability or death, except any compensation paid by the Veterans Administration to a former member of the Armed Forces who is in receipt of retired or retainer pay if such former member has waived a portion of his retired pay in order to receive such compensation), and does not consist of amounts paid, by way of reimbursement or otherwise, to such individual by his employer to defray expenses incurred by such individual in carrying out duties associated with his employment.

(g) In determining the amount of any moneys due from, or payable by, the United States to any individual, there shall be excluded amounts which—

(1) are owed by such individual to the United States,

(2) are required by law to be, and are, deducted from the remuneration or other payment involved, including but not limited to, Federal employment

taxes, and fines and forfeitures ordered by court-martial.

(3) are properly withheld for Federal, State, or local income tax purposes, if the withholding of such amounts is authorized or required by law and if amounts withheld are not greater than would be the case if such individual claimed all dependents to which he was entitled (the withholding of additional amounts pursuant to section 3402(i) of the Internal Revenue Code of 1954 may be permitted only when such individual presents evidence of a tax obligation which supports the additional withholding),

(4) are deducted as health insurance premiums,

(5) are deducted as normal retirement contributions (not including amounts deducted for supplementary coverage), or

(6) are deducted as normal life insurance premiums from salary or other remuneration for employment (not including amounts deducted for supplementary coverage).

Texas Family Code § 5.01 (1975)

(a) A spouse's separate property consists of:

(1) the property owned or claimed by the spouse before marriage;

(2) the property acquired by the spouse during marriage by gift, devise, or descent; and

(3) the recovery for personal injuries sustained by the spouse during marriage, except any recovery

for loss of earning capacity during marriage.

(b) Community property consists of the property, other than separate property, acquired by either spouse during marriage.

Texas Family Code § 5.02 (1975)

Property possessed by either spouse during or on dissolution of marriage is presumed to be community property.

STATEMENT OF THE CASE

Appellant and appellee were married on July 4, 1964. Some two and one-half months after they were married, appellant joined the United States Air Force.

The parties lived together as husband and wife until March, 1977, when they separated, with appellant moving to Texas and appellee moving to California. Appellant filed for divorce in Texas and an agreement was subsequently reached between the parties dividing their marital property. That agreement provided, among other things, that:

> The parties have, prior to the execution of this agreement, divided their real, and personal property with the exception of that listed below, and the parties hereby affirm that said division was just and equitable and in the best interest of the parties.

The trial court approved and incorporated the agreement into its final decree of divorce, and the parties were divorced on December 16, 1977.

On September 30, 1984, appellant retired and was separated from the United States Air Force. At that time, he

began to draw retirement benefits based upon his years of military service.

On September 26, 1984, appellee filed suit seeking a partition of her alleged share of appellant's military retirement benefits. By way of her suit, appellee claimed (1) that the military retirement benefits earned by appellant up to December 16, 1977, were not divided by the terms of the property agreement incorporated into the divorce decree and (2) that, under the provisions of the Uniformed Services Former Spouse's Protection Act (USFSPA), 10 U.S.C. § 1408 (1983) and Sections 5.01 and 5.02 of the Texas Family Code (1975), appellee was a tenant-in-common with appellant in the retirement benefits, was entitled to one-half of the benefits, and was entitled to a partition of her one-half interest therein.

Appellant defended the suit on the grounds that because the retirement benefits in question were earned before the decision of *McCarty v. McCarty*, *supra*, and the enactment of the USFSPA, the application of the cited sections of the Texas Family Code and the USFSPA violated the separation of powers doctrine inherent in the United States Constitution. Appellant's contentions were raised in the trial court by way of pleading and evidence and in the appellate courts by way of brief and arguments. Each court considered and overruled appellant's arguments.

After a trial to the Court, judgment was entered on July 21, 1986, awarding appellee the sum of $429.25 per month, as appellee's share of appellant's military retirement. The judgment of the trial court was affirmed by the intermediate Texas appellate court and review was subsequently denied by the Supreme Court of Texas.

THE QUESTIONS PRESENTED BY THIS APPEAL ARE SUBSTANTIAL

The questions presented by this appeal are substantial for the following reasons:

1. Whether the provisions of the Texas Family Code and the Uniformed Services Former Spouse's Protection Act, as applied by the Texas courts, violate the constitutional doctrine of separation of powers is an important question of federal law which has not been, but should be, settled by this Court.

2. Whether the Uniformed Services Former Spouse's Protection Act, 10 U.S.C. § 1408 (1983), allows an unconstitutional retroactive application of a law so as to destroy existing or vested rights is an important question of federal law which has not been, but should be, settled by this Court.

3. The extent of the retroactive reach of the Uniformed Services Former Spouse's Protection Act, 10 U.S.C. § 1408 (1983) is an important question of federal law which has not been, but should be, settled by this Court.

1.

In 1976, the Supreme Court of Texas established that, in Texas, military retirement benefits, although created by federal statutes, were subject to division upon divorce as vested community property. *Cearley v. Cearley*, 544 S.W.2d 661 (Tex. 1976).

In 1981, this Court overturned the decision in *Cearley*, as well as similar decisions in other states, holding that, because the federal statutes made the military retirement benefits the personal entitlement of the service member, the supremacy clause of the Constitution of the United States precluded state

courts from applying community property rules and dividing military retirement benefits on divorce. *McCarty v. McCarty*, 453 U.S. 210 (1981).

Subsequently, in direct response to this Court's decision in *McCarty*, the Congress enacted the Uniformed Services Former Spouse's Protection Act (USFSPA), 10 U.S.C. § 1408 (1983). The Texas courts then resumed applying community property rules to military retirement benefits earned prior to the *McCarty* decision saying that the purpose and the effect of the enactment of the USFSPA by the Congress was to reverse this Court's decision in *McCarty*. *Cameron v. Cameron*, 641 S.W.2d 210 (Tex. 1982).

If, as held by the Texas courts, the USFSPA was passed by the Congress to reverse or nullify this Court's holding in *McCarty*, that Act violates the doctrine of separation of powers embodied in the Constitution of the United States of America.

It is a settled principal, long established by this Court, that Congress does not have the power to set aside, annul or override final judgments of the Courts of the United States. *Koshkonong v. Burton*, 104 U.S. (14 Otto) 668, 26 L. Ed. 886 (1881); *State of Pennsylvania v. Wheeling & Bellmont Bridge Co.*, 59 U.S. (18 How.) 421, 15 L. Ed. 435 (1855); *Ogden v. Blackledge*, 6 U.S. (2 Cranch) 272, 2 L. Ed. 276 (1802).

This Court in *Ogden v. Blackledge, supra*, established the guiding principal in the analysis of the instant case:

> To declare what the law is, or has been is a judicial power; to declare what the law shall be, is legislative. One of the fundamental principals of all our governments is, that the legislative power shall be separated from the judicial.

Relying upon its holding in *Ogden*, this Court considered the case of *State of Pennsylvania v. Wheeling & Bellmont Bridge Co., supra.* In that case, the Court had declared, in a prior opinion, that a bridge belonging to the Bridge Company was an obstruction to navigation and granted the State an injunction requiring that it be raised or removed.

Subsequent to the making of that determination, the United States Congress passed legislation allowing the Bridge Company to maintain the bridge at its present location, thereby overruling the Court's previous ruling. On appeal from litigation stemming from the Congressional action, this Court held that, once private rights are determined by this Court, they cannot be retroactively abrogated or changed by an act of Congress.

That is, however, exactly what the courts of Texas have sanctioned in this case. In *McCarty*, this Court declared that military retirement benefits were not divisible on divorce. According to Texas courts, Congress, in adopting the USFSPA, has overruled this Court's opinion in *McCarty* not just with respect to rights acquired after *McCarty*, but with respect to rights acquired before *McCarty*. By this Congressional reversal of this Court's opinion in *McCarty*, Congress has violated the doctrine of separation of powers.

2.

Whether Section (c)(1) of the Uniformed Services Former Spouse's Protection Act, 10 U.S.C. § 1408 (1983), allows an unconstitutional retroactive application of a law so as to destroy existing or vested rights is an important question of federal law which has not been, but should be, settled by this Court.

By 1981, it was established under Texas law that, although subject to defeasance, a service member's interest in military retirement benefits was an earned property right which vested even before the retirement of the service member, *Ex Parte Burson*, 615 S.W.2d 192, 196 (Tex. 1981); that the benefits were not earned on the date of their maturity but were a form of deferred compensation earned incrementally during each month of military service, *Cearley v. Cearley*, 544 S.W.2d 661 (Tex. 1976).

The doctrine of inception of title had been long applied by the Texas courts to determine the percentage of benefits which belonged to the community estate of married parties, further confirming that, under Texas law, the benefits were *property rights* acquired in *increments* during the months of military service. *Cearley v. Cearley, supra; Taggart v. Taggart*, 552 S.W.2d 422 (Tex. 1977).

The combined effect of these Texas decisions was to establish that military benefits were property, earned in increments, vested subject to defeasance. *McCarty's* construction of the federal statute settled that the rights were, in fact, the separate property of the service member.

This result has been clearly recognized by other community property jurisdictions: *Griggs v. Griggs*, 686 P.2d 68, 71 (Idaho 1984); *Walentowski v. Walentowski*, 672 P.2d 657, 659 (N.M. 1983); and in Texas: *Allison v. Allison*, 690 S.W.2d 340, 344 (Tex. App. - Fort Worth 1985, writ ref'd n.r.e.); *Forsman v. Forsman*, 694 S.W.2d 112, 114 (Tex. App. - San Antonio 1985, writ ref'd n.r.e.); *O'Connor v. O'Connor*, 694 S.W.2d 152, 154 (Tex. App. - San Antonio 1985, writ ref'd n.r.e.).

In the case at bar, the Court of Appeals for the Third Judicial District of Texas held that appellant could not

prevail, regardless of the correctness of his argument on the constitutional issue. The Court reasoned that appellant had never acquired a

> . . . vested, permanent right to sole enjoyment of his retirement benefits before Congress enacted the USFSPA.

The Court of Appeals rationalized that, under federal decisions, military pensions are recognized as gratuities, that the grant of them created no vested right and that these benefits may be redistributed or withdrawn at any time in the discretion of Congress. Because of this, the Court reasoned, the Supreme Court in *McCarty* could not cause a vesting in petitioner of the right to the benefits.

In *Chirac v. Lessee of Chirac*, 2 Wheat. 257, 4 L. Ed. 234 (1817), the heirs of a naturalized former citizen of France sought to recover property acquired by their ancestor in the state of Maryland. The property rights of the ancestor and the heirs were determined by the laws of Maryland and the rights of the heirs were subject to a forfeiture provision under those statutes because they were not American citizens. However, a treaty between the United States and France had been in force during part of the time that the heirs had held title under Maryland law. The treaty had the effect of overriding the forfeiture provision of the Maryland statutes, but, by the time of the litigation, the treaty had expired. This Court observed that, if the treaty had still been in force, there would be no doubt as to the result and a question existed only because the treaty had expired. The Court held:

> It will be admitted that a right once vested does not require, for its preservation, the continued existence of the power by which it was acquired. If a treaty, or

> any other law, has performed its office by giving a right, the expiration of the treaty or law cannot extinguish that right. 4 L. Ed. 234, at 239.

At the time of the *McCarty* decision, appellant's rights in his military retirement benefits were property under Texas law. This Court's decision in *McCarty* declared those rights to be the separate property of the service member. The rights of petitioner and other similarly situated service members were therefore determined and vested at that time. Even if the statute construed by *McCarty* has been amended so as to change the effect of *McCarty* for the future, the rights which vested on the date of the *McCarty* decision have not been extinguished. The USFSPA cannot extinguish those rights because of the doctrine of separation of powers.

3.

The extent of the retroactive effect of 10 U.S.C. § 1408 is an important question of federal law which has not been, but should be, settled by this Court. Congress did not intend the USFSPA to have retroactive effect past the date of the decision of this court in the *McCarty* case.

It is very clear that the courts of Texas, California, and other community property states are construing the USFSPA as a complete legislative overruling of this Court's decision in *McCarty* and are treating cases in their jurisdictions as though *McCarty* never happened. Texas is certainly going into divorces final prior to *McCarty*, as in this case.

It is appellant's position that Congress did not intend 10 U.S.C. § 1408 (1983) to permit a retroactive holding by the Texas courts that there was a community interest in military retirement rights at the time of the 1977 divorce of appellant

and appellee. If, however, that is what the USFSPA does, appellant respectfully submits that the USFSPA is unconstitutional because there is not sufficient, rational legislative purpose to support that retroactive effect.

Conceding that the spouses of service members need protection, it does not follow that retroactive application of the USFSPA will accord with the standards of due process promulgated by this Court in *Pension Benefit Guaranty Corp. v. Gray & Co.*, 467 U.S. _____, 104 S. Ct. 2709, 81 L. Ed. 2d. 601 (1984) and *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976).

The legislative history of 10 U.S.C. § 1408 gives no indication of why it would be rational or justifiable to reach back years and take from a former service member retirement benefits upon which he has structured his life since retirement; nor is there any discussion of why there is a need to grant such benefits taken from the retired military person to a former spouse who has adjusted her own life and has been living it for years. Such a construction of the Act is a denial of due process of law.

The Court will note that 10 U.S.C. § 1408(c)(1) reads:

> Subject to the limitations of this section, a court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court.

This enabling provision speaks not only in terms of June 25, 1981, it speaks in terms of "the member and his spouse" and does not say the member and his former spouse, nor the member and his spouse or former spouse. Congress seems to

have purposefully allowed the states to act only where there was a spouse (as opposed to a former spouse) on June 25, 1981, or thereafter. This limitation seems also borne out by the definition in 10 U.S.C. § 1408(a)(6) which reads:

> "Spouse or former spouse" means the husband or wife, or former husband or wife, respectively, of a member who, on or before the date of a court order, was married to that member.

"Court order" is defined by subdivision (2) of the statute as follows:

> "Court order" means a final decree of divorce, dissolution, annulment, or legal separation issued by a court, or a court ordered, ratified, or approved property settlement incident to such a decree (including a final decree modifying the terms of a previously issued decree of divorce, dissolution, annulment or legal separation, or a court ordered, ratified, or approved property settlement incident to such previously issued decree), which—
>
> (A) is issued in accordance with the laws of the jurisdiction of that court;
>
> (B) provides for—
>
> (i) payment of child support (as defined in section 462(b) of the Social Security Act (42 U.S.C. 662(b));
>
> (ii) payment of alimony (as defined in Section 462(c) of the Social Security Act (42 U.S.C. 662(c))); or

> (iii) division of property (including a division of community property); and
>
> (C) in the case of a division of property, specifically provides for the payment of an amount, expressed in dollars or as a percentage of disposable retired or retainer pay, from the disposable retired or retainer pay of a member to the spouse or former spouse of that member.

There is no "court order" as defined by the Act in this present case. Judgments in a partition action are not included in the definition.

If, in fact, the intent of Congress in enacting 10 U.S.C. § 1408 was to destroy rights previously vested by final judgments of this Court, appellant most respectfully urges that this legislation is arbitrary and irrational and a denial of due process under the standards of *Pension Benefit Guaranty Corp v. Gray & Co., supra,* and *Usery v. Turner Elkhorn Mining Co., supra.*

Appellant most respectfully prays that in light of the result reached by the Texas Court of Appeals in this case and the results being reached in Texas and other states concerning the retroactive application of 10 U.S.C. § 1408, this Court should decide this important question of federal law.

CONCLUSION

Appellant respectfully prays this Court to note probable jurisdiction and to set this case for preliminary consideration with briefs on the merits and oral argument. Alternatively, in the event the Court should consider this case as not within the Court's appellate jurisdiction, appellant prays that this jurisdictional statement be considered as an application for writ of certiorari and that certiorari be granted.

Respectfully submitted,

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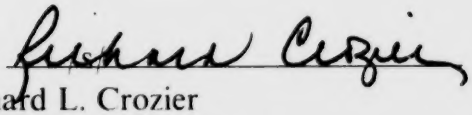
By: 
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ATTORNEYS FOR APPELLANT

APPENDIXES

IN THE COURT OF APPEALS,
THIRD SUPREME JUDICIAL DISTRICT
OF TEXAS, AT AUSTIN

NO. 3-86-079-CV

ROGER PHILIP BRANNON,

APPELLANT

vs.

CONNIE RANDMAA,

APPELLEE

FROM THE DISTRICT COURT OF
WILLIAMSON COUNTY,
26TH JUDICIAL DISTRICT
No. 84-439-C,
HONORABLE WILLIAM S. LOTT, JUDGE

Roger Philip Brannon, appellant, seeks to set aside the judgment of the district court of Williamson County which partitioned appellant's military retirement benefits. Appellee is Connie Randmaa, appellant's former wife. This Court will affirm the judgment.

The parties married on July 4, 1964 and were divorced on December 16, 1977. Appellant joined the United States Air Force on September 30, 1964 and retired on September 30, 1984.

The 1977 divorce judgment recited that the parties had entered into an agreement for the division of their community

property which agreement was approved by the district court and incorporated by reference into the judgment. The parties' agreement made no specific mention of appellant's retirement benefits. The agreement provided *inter alia:*

> The parties have, prior to the execution of this agreement, divided their real, and personal property with the exception of that listed below, and the parties hereby affirm that said division was just and equitable and in the best interest of the parties.
>
> The parties own, as community property, the following property:

The listed property consisted of stocks and savings bonds.

Appellee claimed, and the district court agreed, that because the 1977 divorce judgment did not dispose of the retirement benefits, the court was empowered to partition those benefits. Taggart v. Taggart, 552 S.W.2d 551 (Tex. 1970).

By this third point of error, appellant maintains that the district court erred by ordering partition of the military retirement benefits because the 1977 divorce judgment had the effect of dividing *all* of the property and was therefore *res judicata* as to any subsequent partition suit. Appellant claims that the above quoted language constitutes "a specific determination made by the [divorce] court...that the parties had, prior to the execution of the written agreement, divided their real and personal property," with certain specified exceptions, and that appellee's effort to partition was but an impermissible collateral attack on a valid judgment. For purposes of point of error three, the validity of the judgment of partition hinges upon whether the 1977 divorce judgment did, indeed, dispose of the military retirement benefits.

Appellant argues that the language of the parties' agreement stating that they "divided their real and personal property" signified that prior to rendition of the 1977 judgment, they had disposed of the retirement benefits in his favor. As authority, appellant relies upon Jacobs v. Cude, 641 S.W.2d 258 (Tex. App. 1982, writ ref'd n.r.e.). The facts in *Jacobs* are distinguishable from those in this appeal. The appellee in *Jacobs* relied on a decree specifically awarding him "all community property not mentioned above." *Id.* at 260. The court in *Jacobs* concluded that "[t]he fact that a *residuary* clause to a valid judgment *clearly* included such property is the critical determining factor" precluding partition. *Id.* (Emphasis supplied.) In this appeal there is no "residuary" clause in the judgment. The language relied on by appellant does not purport to dispose of any property inadvertently left undivided, nor does the language "clearly include" military retirement benefits.

Perhaps the most noticeable ambiguity in the clause under consideration is its failure to award any property to either party. In Thompson v. Thompson, 500 S.W.2d 203 (Tex. Civ. App. 1973, no writ), the court concluded that

> In the absence of a 'catch all' or residuary clause in the agreement *specifically providing for the disposition of property* not specifically described therein it could not reasonably be argued that such undisclosed property would be awarded to one party or to the other.

Id. at 208. (Emphasis supplied.)

Should we conclude that the necessary implication of the quoted clause is that the property *possessed* by each party was awarded as a result of their agreed division, nonetheless,

appellant could not prevail. A residuary clause expressly awarding all undivided property to the spouse "in possession" does not divide retirement benefits which come into possession only in the future. Yeo v. Yeo, 581 S.W.2d 734 (Tex. Civ. App. 1979, writ ref'd n.r.e.); Thibodeaux v. Thibodeaux, 546 S.W.2d 662 (Tex. Civ. App. 1977, no writ); Dessomes v. Dessomes, 505 S.W.2d 673 (Tex. Civ. App. 1973, writ ref'd n.r.e.).

The language relied on by appellant is broad and ambiguous. In such circumstances, the district court properly admitted parol evidence to establish the parties' intent. Miller v. Miller, 700 S.W.2d 941, 951 (Tex. App. 1985, writ ref'd n.r.e.). Appellee testifed that she had not discussed military retirement benefits with appellant at the time of divorce. Although appellant testified to the contrary, the district court chose to rely upon appellee's parol proof as to the parties' intent. Accordingly, the district court's determination as to the parties' intent is supported both by the terms of the property agreement and appellee's parol evidence. The point of error is overruled.

By points of error one and two, appellant attacks the judgment of partition claiming a violation of the separation of powers doctrine of the Constitution of the United States and an unconstitutional impairment of his vested rights. Before undertaking an analysis of appellant's constitutional argument, we must again recount the troubled history of the power of the divorce court to divide military retirement benefits.

By 1976, it was clear that military retirement benefits were subject to division as vested community property rights although the present right had not fully matured. Cearley v. Cearley, 544 S.W.2d 661 (Tex. 1976). In 1981, however, the Supreme Court of the United States held that the supremacy

clause of the Constitution of the United States precluded state courts from dividing military retirement benefits on divorce. McCarty v. McCarty, 453 U.S. 210 (1981). In response to *McCarty*, the Congress enacted the Uniformed Services Former Spouses Protection Act (USFSPA), 10 U.S.C.A § 1408(c)(1) (1983) which provided:

> Subject to the limitations of this section, a court may treat retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse *in accordance with the law of the jurisdiction of such court.*

(Emphasis supplied.)

The effect of this legislation was to "reverse" the effect of *McCarty*. Cameron v. Cameron, 642 S.W.2d 210 (Tex. 1982). Accordingly, by reason of the USFSPA, the state courts were vested with the power to treat the division of military retirement benefits in accordance with state law. As a result, in suits for partition of military retirement benefits not disposed of by divorce judgments rendered before *McCarty*, the USFSPA permits the state courts to partition the benefits. *See* Powell v. Powell, 703 S.W.2d 434 (Tex. App. 1985, no writ); Jackson v. Green, 700 S.W.2d 620 (Tex. App. 1984, writ ref'd n.r.e.); *see also* Schwartz and McClure, *Federal Retirement Benefits;* State Bar, Advanced Family Law Course (1986) (USFSPA returned law to its status prior to McCarty; therefore "the law of Texas is now as it was prior to *McCarty*, and military retirement benefits can once again be partitioned under *Taggart v. Taggart*...").

Appellant suggests that application of the USFSPA to allow the district court to partition military retirement

benefits permits an unlawful retroactive revision by Congress of the law in 1977, as declared by *McCarty*. As argued by appellant, this retroactive revision of the Supreme Court's declaration of the law violates the separation of powers doctrine embodied in the Constitution. Accordingly, appellant insists that the USFSPA, as applied to the facts in this appeal, is unconstitutional.

A detailed analysis of appellant's argument is as follows: During the years before his divorce, appellant was incrementally "earning" his retirement benefits by serving in the Air Force. At the time of divorce in 1977, all of the retirement benefits he had earned were his "separate property" under the framework of the federal military retirement statute. The retirement benefits were appellant's separate property by virtue of the opinion in *McCarty*, handed down in 1981, which determined that military retirement benefits were a "personal entitlement" of the serviceman under the federal statute. Appellant's "rights" in the retirement benefits, as above described, vested at the time of divorce. Absent any community interest in the benefits, the benefits could not be subject to a subsequent partition. Once appellant's rights in the retirement benefits vested in 1977, Congress could not retroactively change the law through passage of the USFSPA in 1983 so that benefits declared to be separate property up to 1981 by the Supreme Court in *McCarty* could become community property subject to partition for retirement "pay periods beginning after June 25, 1981...." 10 U.S.C.A. § 1408(c)(1) (1983).

Accordingly, appellant insists that the district court's application of the USFSPA:

> (a) violated the separation of powers principle because the statute, in effect, overrules retroactively

the past construction of the retirement statute declared in *McCarty*. *See* 16 C.J.S. *Constitutional Law* § 116 (1984) ("Since the determination of the true state and meaning of the law is not a legislative function, the legislature cannot declare what the law was in the past.");

(b) involved the unconstitutional retroactive application of a law so as to destroy existing or vested rights.

In support of his argument of a constitutional limitation on the retroactive application of statutes, appellant relies upon several opinions by the Supreme Court of the United States holding that once one establishes a right pursuant to a judicial interpretation of a statute, the legislature is barred by the separation of powers doctrine from retroactively setting aside that interpretation by changing the statute. This rule has been applied when the individual right was established by a specific judgment, State of Pennsylvania v. Wheeling & Bellmont Bridge Co., 18 How. 421 (1855) and (as is claimed in this appeal) when the right is established by a judicial opinion declaring a rule of law to be applied generally. Ogden v. Blackledge, 2 Cranch 272 (1802); Koshkonong v. Burton, 104 U.S. 886 (1881).[1]

---

[1] The precedential value of appellant's authorities has been eroded. Ogden v. Blackledge, *supra*, involved a *state* legislature retroactively changing a judicial declaration of state law, yet, the United States Supreme Court held that the separation of powers doctrine was violated. After Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938), such circumstances would not present a federal question. *Koshkonong* is an opinion in which state law was retroactively changed after the plaintiff had acquired contractual rights *vis-a-vis* the state by virtue of a particular statute. Therefore, although *Koshkonong* states the rule advocated by appellant (relying on *Ogden*), it is not a separation of powers case, but instead involves an impairment of contracts. It is plain that any "right" that appellant may have in his retirement benefits was not established pursuant to a contract.

Appellant stands primarily upon State of Pennsylvania v. Wheeling & Bellmont Bridge Co., *supra.* In *Wheeling*, the Supreme Court of the United States had concluded in a prior opinion that a bridge across the Ohio River was an obstruction to navigation. The Court granted the plaintiff an injunction commanding that the bridge be raised or removed. Thereafter, Congress passed legislation declaring lawful the maintenance of the bridge at its original elevation. In its analysis, the Supreme Court recognized that to the extent that private rights vest by virtue of a prior judgment, they may not be retroactively abrogated by act of Congress. *See also* Cerro Metal Products v. Marshall, 467 F.Supp. 869 (E.D. Pa. 1979).

Assuming arguendo the validity of appellant's premise, appellant, nevertheless, cannot prevail in this appeal. This is so because appellant never acquired a vested, permanent right to sole enjoyment of his retirement benefits before Congress enacted the USFSPA. It is true that the effect of the opinion in *McCarty* was to declare the benefits to be solely appellant's, but the Supreme Court just as certainly could not vest in appellant *for all time* the uninterrupted right to those benefits.

"Pensions, compensation allowances and privileges are gratuities. They involve no agreement of parties; and the grant of them creates no vested right. The benefits conferred by gratuities may be *redistributed or withdrawn* at any time in the discretion of Congress." Lynch v. United States, 292 U.S. 571 (1934) (Emphasis supplied.) Although military retirement benefits have been distinguished from pensions in that they are *earned* during active service, they, too, are subject to the will of Congress, and the grant of such benefits imparts no vested rights. Goodley v. United States, 287 F.2d 573 (Ct. Claims), *cert. denied,* 368 U.S. 915 (1961).

When Congress passed the USFSPA, it was exercising its plenary power to deal with pension benefits. Although the USFSPA allowed a division of military retirement benefits not permitted under the prior military retirement scheme, the USFSPA could not destroy any vested right accruing to appellant under federal law. The only claimed basis in federal law for a right to the retirement benefits comes from the retirement statute as interpreted by the Supreme Court in *McCarty*. Under law, the retirement statute does not confer a vested right because retirement benefits are entirely subject to the changing will of Congress.

By passage of the USFSPA, Congress did not retroactively alter appellant's established rights as declared by the Court in *McCarty;* instead, it was lawfully exercising its plenary power to presently modify the privileges and duties conferred by the statutory military retirement benefit scheme. As such, the separation of powers doctrine was not violated, nor was the USFSPA retroactively applied in violation of the Constitution.

The judgment is affirmed.

/s/
Bob Shannon, Chief Justice

[Before Chief Justice Shannon, Justices Brady and Aboussie]
Affirmed
Filed: August 12, 1987
[Publish]

IN THE COURT OF APPEALS,
THIRD SUPREME JUDICIAL DISTRICT
OF TEXAS, AT AUSTIN

JUDGMENT RENDERED AUGUST 12, 1987

3-86-079-CV

ROGER PHILIP BRANNON V. CONNIE RANDMAA
APPEAL FROM 26TH DISTRICT COURT
OF WILLIAMSON COUNTY

Before Chief Justice Shannon, Justices Brady and Aboussie

AFFIRMED — Opinion by Chief Justice Shannon

THIS CAUSE came on to be heard on the transcript of the record and same being inspected, because it is the opinion of the Court that there was no error in the trial court's judgment; IT IS THEREFORE considered, adjudged and ordered that the judgment of the trial court be and is hereby in all things affirmed. It is FURTHER ordered that appellant, Roger Philip Brannon, as principal, and National Surety Corporation, as surety on the cost bond herein, pay all costs of this appeal; and that this decision be certified below for observance.

OFFICIAL NOTICE FROM THIRD COURT OF APPEALS

RE: No. 3-86-079-CV—
Roger Philip Brannon v. Connie Randmaa

September 30, 1987

You are hereby notified that appellant's motion for rehearing was this day submitted and overruled.

/s/
Susan K. Bage, Clerk

THIRD COURT OF APPEALS
P.O. BOX 12547
AUSTIN, TEXAS 78711

MAIL TO: Mr. William R. Travis
Salmanson, Smith, Deitch & Travis
P.O. Box 49289
Austin, Texas 78765-9289

IN THE SUPREME COURT OF TEXAS

NO. C-6931	)	January 6, 1988
	)	
ROGER PHILIP BRANNON	)	From Williamson County,
	)	
vs.	)	Third District
	)	
CONNIE RANDMAA	)	

Application of petitioner for writ of error to the Court of Appeals for the Third District having been duly considered, and the Court having determined that the application presents no error of law which is of such importance to the jurisprudence of the State as to require correction, or reversal of the judgment of the Court of Appeals, it is ordered that said application be, and hereby is, denied. (Chief Justice Phillips not sitting.)

It is further ordered that applicant, Roger Philip Brannon, and Surety, National Corporation, pay all costs incurred on this application.

CASE NO. C-6931

IN THE SUPREME COURT OF TEXAS
THIRD SUPREME JUDICIAL DISTRICT
AUSTIN, TEXAS

ROGER PHILIP BRANNON	§	Petitioner
	§	
VS.	§	
	§	
CONNIE RANDMAA	§	Respondent
	§	

****

NO. 3-86-079-CV

IN THE COURT OF APPEALS
FOR THE THIRD SUPREME JUDICIAL DISTRICT
OF TEXAS, AUSTIN, TEXAS

ROGER PHILIP BRANNON	§	Appellant
	§	
VS.	§	
	§	
CONNIE RANDMAA	§	Appellee
	§	

****

NOTICE OF APPEAL

Notice is hereby given that ROGER PHILIP BRANNON, Appellant above named, hereby appeals to the Supreme Court of the United States from the Judgment and Orders of the Court of Appeals For The Third Supreme Judicial District sitting in Austin, Texas, in said Court's, Cause No. 3-86-079-CV in which Judgment was entered on August 12, 1987, and from the denial of the Application For Writ of Error to review said Judgment, by the Supreme Court of Texas under its Cause No. C-6931 on January 6, 1988, which Order is the Final Judgment or Decree rendered by the highest court of a state in which a decision could be had. This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Respectfully submitted this 24th day of February, 1988.

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By: /s/
William R. Travis
State Bar No. 20195000
Attorneys for Appellant

PROOF OF SERVICE

I, James E. Farris, attorney for Appellee, Connie Randmaa, hereby acknowledge that a copy of the above Notice of Appeal was personally served upon Appellee, through me, her attorney of record, this 24th day of February, 1988.

/s/
JAMES E. FARRIS
Attorney for Appellee

Supreme Court, U.S.
FILED
MAY 2 1988
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 87-1650

In The

Supreme Court of the United States

October Term, 1987

ROGER PHILIP BRANNON,

Appellant,

v.

CONNIE RANDMAA,

Appellee.

On Appeal From The Court of Appeals
For The Third Judicial District of Texas

MOTION TO DISMISS OR AFFIRM

JANICE LOY GREEN
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20 pp

QUESTIONS PRESENTED BY APPELLANT

1. Do the provisions of Sections 5.01 and 5.02 of the Texas Family Code (1975) and the provisions of the Uniformed Services Former Spouses' Protection Act, 10 U.S.C. Section 1408 (1983), as applied by the courts of Texas, violate the constitutional doctrine of separation of powers?

2. Does the Uniformed Services Former Spouses' Protection Act, 10 U.S.C. Section 1408 (1983), allow an unconstitutional retroactive application that destroys existing and vested rights?

3. What is the extent of the retroactive reach of the Uniformed Services Former Spouses' Protection Act, 10 U.S.C. Section 1408 (1983)?

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MOTION TO DISMISS OR AFFIRM

Appellee, pursuant to U.S. Supreme Court Rule 16, Subsections (b), (c) and (d), moves the Court to dismiss the appeal on the following grounds:

(1) this appeal is not within this Court's jurisdiction under 28 U.S.C. 1257(2);

(2) it does not present a substantial federal question;

(3) it is manifest that the questions on which the decision of the cause depend are so unsubstantial as not to need further argument.

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OPINION BELOW

The Opinion of the Court of Appeals for the Third Supreme Judicial District of Texas is reported at 736 S.W.2d 175. The denial of review by the Texas Supreme Court was without opinion.

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STATEMENT OF THE CASE

Appellant and Appellee were married from July 4, 1964, until they were divorced by the Texas courts on December 16, 1977. During this marriage, Appellant served in the United States Air Force from September 30, 1964 until the parties' date of divorce; subsequently, Appellant retired from his military service on September 30, 1984, and Appellant began receiving his military retirement benefit payments on the last day of October, 1984.

On September 26, 1984, Appellee filed a suit in the Texas district court to partition the military retirement benefits. The partition was granted because the parties' divorce decree did not provide for the division of the military retirement benefit payments and because Texas law entitles Appellee to recover her share of these retirement benefit payments. The trial court's judgment in favor of Appellee was affirmed on August 12, 1987, by the Texas Court of Appeals in *Brannon v. Randmaa*, 736 S.W.2d 175 [opinion set forth in J.S., A-1]. On January 6, 1988, the Texas Supreme Court denied Appellant's application for writ of error after determining that Appellant's application presented no error of law which is of such importance as to require correction or reversal of the judgment of the Court of Appeals [J.S., A-12].

All of the military nondisability retirement benefit payments at issue in this case are payable after the February 1, 1983, effective date of the Uniformed Services Former Spouses' Protection Act, 10 U.S.C. Section 1408 (1983) (hereafter referred to as "USFSPA").

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SUMMARY OF ARGUMENT

I. This Court Lacks Jurisdiction Under 28 U.S.C. Section 1257(2).

II. The Questions Presented Are Unsubstantial and Were Correctly Decided Below.

BRIEF OF ARGUMENT

I. This Court Lacks Jurisdiction Under 28 U.S.C. Section 1257(2).

Appellant asserts jurisdiction under 28 U.S.C. Section 1257(2) by claiming that Texas community property statutes have been applied in a way repugnant to the laws of the United States as set forth in *McCarty v. McCarty*, 453 U.S. 210, 101 S.Ct. 2728 (1981).

Appellant's theory rests on two incorrect assumptions: (1) that the *McCarty* decision declared that the Appellant-servicemember's military retirement benefits are his separate property, and (2) that the *McCarty* decision in effect retroactively vested Appellant's rights to his military benefit payments.

Prior to the *McCarty* decision, Texas considered military retirement benefits to be divisible at time of divorce, *Busby v. Busby*, 457 S.W.2d 551 (Tex. 1970), or to be divisible subsequent to a divorce action by way of a partition suit, *Taggart v. Taggart*, 552 S.W.2d 422 (Tex. 1970).

The *McCarty* decision did not address the issue of whether military retirement benefits paid in a community property state would be characterized under such state's marital property laws as separate or community property. Instead, the Court held that military retirement benefits were not divisible upon divorce because of the federal preemption doctrine. The Court concluded that there was a conflict

between the terms of the federal retirement statutes as they then existed and state community property rights. *McCarty*, at 2741.

"Nothing in *McCarty* suggests that the Supreme Court therein intended to invalidate, or otherwise render unenforceable, prior valid and subsisting state court judgments. Absent some indication of such an intent, we decline to do so." *Erpsan v. Badgett*, 647 F.2d 550, reh. denied en banc, 659 F.2d 26, at 28 (5th Cir. 1981); *Wilson v. Wilson* 667 F.2d 497 (5th Cir. 1982), cert. denied, 102 S.Ct. 3485 (1982). The Texas Supreme Court agreed with the U.S. Fifth Circuit Court of Appeals in *Segrest v. Segrest*, 649 S.W.2d 610 (Tex. 1983). The *Segrest* opinion reviewed United States Supreme Court decisions from 1905 through 1982 and determined:

> None of the cases involving the question of federal law preemption of state community property law indicate an intent to invalidate or otherwise render unenforceable in retroactive fashion all prior valid and subsisting state court judgments. See *Ridgway v. Ridgway*, 454 U.S. 46, 102 S.Ct. 49, 70 L.Ed.2d 39 (1981); *McCarty v. McCarty*, 453 U.S. 210, 101 S.Ct. 2728, 69 L.Ed.2d 589; *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 99 S.Ct. 802, 59 L.Ed.2d 1 (1979); *Yiatchos v. Yiatchos*, 376 U.S. 306, 84 S.Ct. 742, 11 L.Ed.2d 724 (1964); *Free v. Bland*, 369 U.S. 663, 82 S.Ct. 1089, 8 L.Ed.2d 180 (1962); *Wissner v. Wissner*, 338 U.S. 655, 70 S.Ct. 398, 94 L.Ed.2d 424 (1950); *McCune v. Essig*, 199 U.S. 382, 26 S.Ct. 78, 50 L.Ed. 237 (1905).

Segrest, at 612. Further the Texas Supreme Court in *Segrest* applied this Court's *Chevron v. Huson* three-prong test for determining whether a judicially modified or abrogated rule of law, such as in *McCarty*, should be given retroactive operation. 404 U.S. 97, 92 S.Ct. 349 (1971). The conclusion

reached after applying the *Chevron* three-prong test was that *McCarty* did not retroactively alter prior state court judgments which divided military retirement benefits in divorce or partition suits. *Segrest*, at 612.

This Court stated in *McCarty* that "Congress may well decide . . . that more protection should be afforded the former spouse of a retired service member. This decision, however, is for Congress alone." *McCarty*, at 2743. By enacting the Uniformed Services Former Spouses' Protection Act, 10 U.S.C. Section 1408 (1983), the Congress did just that. Section 1408(c)(1) provides:

> Subject to the limitations of this section, a court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse *in accordance with the law of the jurisdiction of such court*. (Emphasis added.)

Thus, Congress returned to state courts that authority which *McCarty* had preempted them from exercising and thereby removed the conflict between state and federal laws which was the basis of the *McCarty* reasoning.

The jurisdictional basis asserted by Appellant in 28 U.S.C. Section 1257(2), namely, that Texas community property laws are repugnant to federal retirement laws, no longer exists. What is being assailed in this appeal is not a state statute, per 28 U.S.C. Section 1257(2), but a federal statute, the USFSPA. While Appellant also claims that the USFSPA is unconstitutional, that is not a basis for this Court's appellate jurisdiction of state court decisions under 28 U.S.C. 1257(2).

II. The Questions Presented Are Unsubstantial and Were Correctly Decided Below.

If the Texas Court of Appeals decision is reviewable at all, it is so only by the discretionary writ of certiorari, under 28 U.S.C. 1257(3) which the Appellant requests this Court to do (J.S., p.33). Appellant asserts that the USFSPA is unconstitutional and therefore, the Court of Appeals' decision, which was based in part on the effect of the USFSPA, is invalid. Further, Appellant claims that the constitutionality of the USFSPA is "an important question of federal law which has not been, but should be, settled by this Court" (J.S., p.24).[1] A review of this Court's summary disposition of cases since the passage of the USFSPA weakens Appellant's claims.

In the case of *Trahan v. Trahan*, 682 S.W.2d 332 (Tex. Civ. App.-Austin 1984, writ ref'd n.r.e.) federal questions were appealed concerning the constitutionality of the retroactive application of the USFSPA to pre-*McCarty* divorce decrees. Sec. 12 FLR 1152 (1986). This Court dismissed *Trahan* (No. 85-1050) for want of a substantial federal question at 106 S.Ct. 1171 (1986) and denied the petition for rehearing at 106 S.Ct. 1664 (1986); thus, the Texas court's decision that the USFSPA is to be applied retroactively to restore law to what it was prior to *McCarty*, and thus is not an unconstitutional garnishment of wages, was affirmed.

The case of *Powell v. Powell*, 703 S.W.2d 434 (Tex. App.-Waco 1985, writ ref'd n.r.e.) presented questions concerning the constitutionality of the USFSPA's retroactive removal of the *McCarty* preemption. Section 12 FLR 1276 (1986). On

[1] To Appellee's knowledge, Appellant has failed to comply with the requirements of Rule 28(b) and (c), U.S. Sup.Ct. Rules (1987), regarding service on the Solicitor General, Department of Justice, and the Texas Attorney General, of the initial papers filed in this proceeding wherein the constitutionality of an Act of Congress or State Statute is drawn into question.

June 11, 1986, this Court dismissed the *Powell* appeal (No. 85-1459) for want of a substantial federal question. 106 S.Ct. 2911 (1986).

Other similar summary dispositions of cases raising questions concerning the retroactive application of the USFSPA are *Wintriss v. Wintriss*, cert. denied, 107 S.Ct. 104 (1986), No. 85-2104, from the California Court of Appeals; *Thompson v. Thompson*, appeal dismissed for want of a substantial federal question, 107 S.Ct. 43 (1986), No. 86-122, from the California Court of Appeals; *Potter v. Abshire*, cert. denied and appeal dismissed for want of jurisdiction, 107 S.Ct. 1262 (1987), No. 86-568, 179 Cal. App.3d 73, 224 Cal. Rptr. 312 (1986); *Jett v. Jett*, 458 S.2d 473, appeal denied at 105 S.Ct. 2115 (1984), No. 84-1375.

The Texas Court of Appeals correctly took issue with Appellant's reliance upon U.S. Supreme Court case authority dated in the 1800s. (See, J.S., App. A-7, fn 1.) Appellant quotes dictum from *Ogden v. Blackledge*, 6 U.S. (2 Cranch) 272, 2 L.Ed. 276 (1802), "To declare that the law is, or has been is a judicial power; to declare what the law shall be, is legislative." Appellee agrees with this statement. The passage of the USFSPA declared what the law "shall be" as applied to this case which only involves military retirement payments paid after its effective date. The *McCarty* decision, while declaring what the law was at the time of its holding, did not declare its retroactive application to pre-*McCarty* marital property rights. *Ogden* involved a North Carolina law which retroactively changed that state's prior law covering timetables for creditors of a deceased to file claims. This case would not, today, present a federal question after *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

The Court below correctly held that the effect of the USFSPA was to reverse the effect of *McCarty* following *Cameron v. Cameron*, 642 S.W.2d 210 (Tex. 1982). Even the

legislative history of the USFSPA shows that Congress believed the Act would permit former military spouses, otherwise blocked by the *McCarty* decision, to return to state courts and obtain new decisions on division of military nondisability retirement benefits. This history of Congressional intent and action is highlighted in the following analysis of the above-quoted Section 1408(c)(1):

> The purpose of this provision is to place the courts in the same position that they were in on June 26, 1981, the date of the *McCarty* decision, with respect to treatment of non-disability military retired or retainer pay. *The provision is intended to remove the federal pre-emption* found to exist by the United States Supreme Court and permit State and other courts of competent jurisdiction to apply pertinent State or other laws in determining whether military retired or retainer pay should be divisible. (Emphasis added.)

S. Rep. No. 97-502, 97th Cong., 2d Sess. 16, reprinted in 1982 U.S. Code Cong. & Admn. News 1611 (1983).

Other states' courts agree with Texas' courts interpretation of *McCarty* and the USFSPA. An overwhelming number of state courts have held that military nondisability retirement benefits are divisible just as they had been prior to the *McCarty* decision; constitutional arguments similar to those of Appellant have not been adopted in other states. See, *Chase v. Chase*, 662 P.2d 944, 946 (Alaska 1983) which held that the USFSPA is "remedial action by Congress" and "therefore, obviates *McCarty* and in turn becomes controlling under the Supremacy Clause"; *In re Marriage of An Kenman*, 142 Cal. App.3d 833, 191 Cal. Rptr. 292, 294 (Ct. App. 1983); *Griggs v. Griggs*, 107 Idaho 123, 686 P.2d 68, 71 (1984); *Walentowski v. Walentowski*, 100 N.M. 484, 672 P.2d 656, 659 (1983); *Bullock v. Bullock*, 354 N.W.2d 904, 908 (N.D. 1984); *In re*

Marriage of Smith, 100 Wash.2d 319, 669 P.2d 448, 450 (1983); *In re Marriage of Hopkins*, 142 Cal.App.3d 350, 191 Cal. Rptr. 70 (Ct. App. 1983); *DeGryse v. DeGryse*, 661 P.2d 185 (Ariz. St. Ct. 1983); *In re Smith*, 9 FLR 2705 (Wash S.Ct. 1983); *Castiglioni v. Castiglioni*, 10 FLR 1317 (N.J. Super. Ct. 1984); *Smith v. Smith*, 458 A.2d 811 (Del. Fam. Ct. 1983); *Coates v. Coates*, 650 S.W.2d 307 (Mo. App. 1983); *Brown v. Brown*, 279 S.C. 116, 302 S.E.2d 860, 861 (1983); *In re Marriage of Giroux*, 704 P.2d 160, 41 Wash. App. 315 (1985), *Edsall v. Superior Court*, 143 Ariz. 240, 693 P.2d 895 (1984).

Appellant also argues for the first time on this appeal that a partition action is not a "court order" under the USFSPA, a position contrary to the holdings in other Texas cases. See, *Trahan v. Trahan*, 882 S.W.2d 332 (Tex. App.-Austin 1984, writ ref'd n.r.e.); *Southern v. Glenn*, 677 S.W.2d 576 (Tex. App.-San Antonio 1984, writ ref'd n.r.e.); *Harrell v. Harrell*, 684 S.W.2d 118 (Tex. App.-Corpus Christi 1984) rev'd 692 S.W.2d 876 (Tex. 1985), on remand 700 S.W.2d 645 (Tex. App.-Corpus Christi 1985, no writ); and *Harkrider v. Morales*, 686 S.W.2d 712, 174 (Tex. App.-San Antonio 1985, no writ).

The theory of a partition action in the divorce context is that former spouses become tenants-in-common as to any assets not divided in their divorce decree. As tentants-in-common, they are entitled to seek a partition of their co-tenant estate. Partition affects the right to possession of property, not the ownership title of the property. The Court below correctly applied Texas state law in that the parties' divorce decree did not specifically divide the military retirement benefits, leaving such undisposed asset subject to a suit to partition. Thus, a partition judgment is a type of court order defined and described in 10 U.S.C. Section 1408(a)(2) as being a "final decree modifying the terms of a previously issued decree of divorce." A partition decree fills in the blanks, so to speak, of a divorce decree.

Therefore, Appellant's argument that his right to his military retirement benefits was vested in just him, by the *McCarty* decision, does not follow since both Appellant and Appellee held the benefits as tenants-in-common under Texas law from the time of their divorce.

Further, Appellant's argument that he was unconstitutionally divested by the USFSPA of rights "vested" by *McCarty* thus posing a federal question is "so attenuated and unsubstantial as to be absolutely devoid of merit" and thus does not meet the requirement of a substantial federal question. See, *Newburyport Water Co. v. Newburyport*, 193 U.S. 561, 579; 24 S.Ct. 553, 557 (1904).

The Texas Court of Appeals in this case correctly stated that the Appellant "never acquired a vested, permanent right to sole enjoyment of his retirement benefits before Congress enacted the USFSPA." 736 S.W.2d 175, 178. Since 1882 federal case law has stated that a "pension granted by the government confers no right which cannot be revised, modified, or recalled by subsequent legislation. *U.S. Ex. Rel. Burnett v. Teller*, 107 U.S. 64, 2 S.Ct. 39, 27 L.Ed. 352 (1882)." *Stouper v. Jones*, 284 F.2d 240, 242 (D.C.C.A. 1960). See also, *Lynch v. U.S.*, 292 U.S. 71, 54 S.Ct. 840, 78 L.Ed. 434 (1934).

"The status of retirement for military personnel and the right to and the amount of retired and retirement pay are created and controlled by statute." *Abbott v. U.S.*, 287 F.2d 573, 576, 152 Ct.Cl. 798, 804, cert. denied 368 U.S. 915, 82 S.Ct. 192, 798, 7 L.Ed.2d 130 (1961); *Goodley v. U.S.*, 441 F.2d 1175, 1178 (Ct.Cl. 1971). A more recent federal decision expounding on the vesting issue of military retirement is *Costello v. U.S.*, 587 F.2d 424 (9th Cir. 1978) cert. denied 99 S.Ct. 2858, 442 U.S. 929, 61 L.Ed.2d 296. This case is about military personnel who retired before the effective date of 1963 statutory changes tying adjustment of retirement compensation to the cost of living index rather than to active duty pay scales. The retired

servicemen contended that they had a vested right to a particular computation of their retirement pay that was in effect at the time they retired and that the subsequent act unconstitutionally retroactively deprived them of that vested right.

At page 425 of the *Costello* opinion, the Court quotes the relevant U.S. Supreme Court precedent: "No one disputes that Congress may prospectively reduce pay of members of the armed forces, even if that reduction deprived members of benefits they had expected to be able to earn. Cf. *Bell v. U.S.*, 366 U.S. 393, 81 S.Ct. 1230, 6 L.Ed.2d 365 (1961); *U.S. v. Dickerson*, 310 U.S. 554, 60 S.Ct. 1034, 84 L.Ed. 1356 (1940)." The Ninth Circuit Court of Appeals concluded that since military retirement pay could be prospectively altered by Congress, then the "vested rights" argument of the servicemen did not apply.

Because Appellant's rights were not "vested" in him by the *McCarty* decision, by Texas community property law or by federal military retirement law, Appellant's constitutionality issues of due process and separation of powers are without substance.

It is important to remind this Court of what is not at issue in this case. All military retirement payments affected by the lower Texas courts' decisions are payable after the effective date of the USFSPA, that is, February 1, 1983. The fact that the USFSPA retroactively affects payments beginning June 25, 1981, and any constitutional challenge to the Act so doing, is not an issue and is totally irrelevant to the facts in this case.

The speciousness of Appellant's position reaches a pinnacle on page 30 of his Jurisdictional Statement. Appellant, in essence, argues that since Appellee has gotten by so far without her portion of the retirement benefits, then why should Appellant have to change his economic lifestyle

now since he's come to depend upon the retirement benefits? Appellant equates a change in his lifestyle to a denial of due process of law. To borrow from Appellant's authority cited for his due process theory, legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16 (1976). Fortunately the appellate jurisdiction of this Court, as well as its discretionary certiorari jurisdiction, is not exercised on grounds of Great Expectations.

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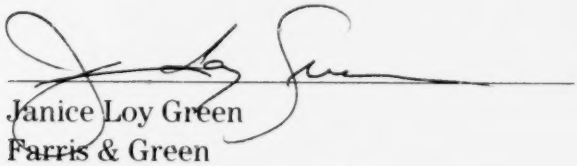
CONCLUSION

Wherefore, Appellee respectfully submits that Appellant's claims are so lacking in substance and merit as to be frivolous. Appellee respectfully moves this Court to dismiss this appeal or, in the alternative, affirm the court below and to deny any application for writ of certiorari.

Respectfully submitted,



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